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SUPREME COURT, U.S.

No. 05-1565

In the Supreme Court of the United States

DANIEL LEE MERRILL, SR.,
Petitioner,

v.

BURKE E. PORTER MACHINERY COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Introduction 1

Argument 2

I. JURISDICTION 2

A. The Modified *McDonnell Douglas* Issue Was Raised and Addressed Below 2

B. The "Sole" versus "Motivating Cause" Issue Was Raised and Addressed Below . 3

C. The "Interacting with Others" as a Major Life Activity Issue Was Raised and Addressed Below 4

II. THE MODIFIED *MCDONNELL DOUGLAS* TEST . 6

III. THE STANDARD FOR CAUSATION 9

IV. INTERACTING WITH OTHERS AS A MAJOR LIFE ACTIVITY 10

Conclusion 10

Appendix

Appendix D - Affidavit of Robert J. Eleveld . . . 125a

TABLE OF AUTHORITIES

Cases

McAlindin v. County of San Diego,
192 F.3d 1226 (9th Cir. 1999) 6

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) . . . . . *passim*

MX Group, Inc. v. City of Covington,
293 F.3d 326 (6th Cir. 2002) 6

O'Connor v. Consolidated Coin Caterer's Corp.,
517 U.S. 308 (1996) 6, 7

Solieau v. Guilford of Maine, Inc.,
105 F.3d 12 (1st Cir. 1997) 6

Statutes

42 U.S.C. § 12101, *et seq* . . . . . *passim*

Rule

Sup. Ct. R. 10(a) 2, 3, 4

REPLY BRIEF FOR PETITIONER

INTRODUCTION

Respondent has provided no persuasive reason for this Court to leave unreviewed the Sixth Circuit Court of Appeal's decision in this case. As explained below, and as exhaustively reviewed in the petition for a writ of certiorari, the Sixth Circuit's decision is wholly inconsistent with its sister Circuits on a variety of critical legal issues, including issues arising under this Court's *McDonnell Douglas* test and under the American's with Disabilities Act (ADA). Respondent's attempt to distort the underlying record and to dismiss the nature of the split of authority on these legal issues is unavailing and should not dissuade this honorable Court from issuing a writ of certiorari.

In keeping with its obligations, Petitioner will limit his Reply to only the new points raised in Respondent's Opposition Brief.[1] Petitioner will address such new points below and in the following order: (1) jurisdiction; (2) the *McDonnell Douglas* burden-shifting test; (3) the standard of causation in ADA cases: and (4) "interacting with others" as a major life activity under the ADA.

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[1] Petitioner notes for the record that Respondent's Counter-Statement of Facts contains numerous inaccuracies and misstatements. Inasmuch as the District Court issued exhaustive findings of fact in this case, which were summarized by the Sixth Circuit, and for purposes of the petition, Petitioner will rely upon the facts adduced by the District Court (App. 15a–63a) and recited by the Sixth Circuit (App. 4a–6a) rather than outline each such inaccuracy.

ARGUMENT

I. JURISDICTION

An overarching theme proffered by Respondent is that this Court lacks jurisdiction to hear this case. Specifically, Respondent argues that none of the issues raised by Petitioner are "in conflict with the decision of another United States Court of Appeals" pursuant to S. Ct. R. 10(a) and, further, that such issues were neither raised with nor decided by the Sixth Circuit. (Opp. 13-14). Therefore, according to Respondent, the issues are not a proper subject for review. But, this is not true. The issues *were*, in fact, raised by Petitioner; yet, the Sixth Circuit either chose to ignore such arguments or summarily dismissed them, as will be discussed in more detail below.

A. The Modified *McDonnell Douglas* Issue Was Raised and Addressed Below.

The first issue raised by Petitioner is the split of authority on a modified *McDonnell Douglas* test involving a discriminatory discharge during a RIF. As the record shows, *both* Petitioner and Respondent repeatedly asserted in their briefing that Petitioner's employment was terminated on June 8, 2001, that Petitioner was not replaced, and that Respondent reduced its workforce during the summer and fall of 2001. Indeed, the District Court expressly held: "Plaintiff was not replaced following his termination. During the summer and fall of 2001, other BEPCO employees were let go as part of a reduction in force." (App. 63a). Respondent now takes the position that Petitioner never argued that "his burden of proof should have been modified because of a reduction in force." (Opp. 15). This statement, however, is directly contradicted by the record. In his Brief on Appeal to the Sixth Circuit, Mr. Merrill expressly argued that the *McDonnell Douglas* test should be modified to allow him to provide evidence to

support a reasonable inference of discrimination. (Plaintiff's Brief on Appeal, at 20-21). Moreover, and as Respondent's counsel well knows, Petitioner and Respondent thoroughly argued the issue of whether the *McDonnell Douglas* test should be modified due to the RIF circumstances during Oral Argument before the Sixth Circuit Court of Appeals. (Affidavit of Robert E. Eleveld ("Eleveld Aff."), ¶¶ 1-3, App. 125a). Unfortunately, Petitioner cannot submit a copy of that hearing transcript to this Court because the Sixth Circuit Court of Appeals destroyed that recording before the end of the 90-day window for filing the petition for writ of certiorari. (Eleveld Aff., ¶ 4, App. 125a). Thus, such a transcript is no longer available to the parties or this Court.

In any event, Petitioner did in fact argue before the Sixth Circuit that a modified *McDonnell Douglas* test should be applied in cases involving discriminatory discharge during a RIF. However, the Sixth Circuit did not apply a modified *McDonnell Douglas* test, a decision that exacerbates the conflict among the circuits about the proper application of the *McDonnell Douglas* test in RIFs. This issue is, therefore, ripe for appeal.

B. The "Sole" versus "Motivating Cause" Issue Was Raised and Addressed Below.

Respondent also argues that, although Petitioner briefed and argued the "sole cause" issue before the Sixth Circuit, the Sixth Circuit did not rule on the issue, and, therefore, it is unnecessary for this Court to consider it. (Opp. 22-24). According to Respondent, the Sixth Circuit's refusal to opine upon this issue did not create a further split among its sister courts and, therefore, its decision is not "in conflict" with another United States Court of Appeals for purposes of Sup. Ct. R. 10(a). As this Court may recall, the *only* reason why the Sixth Circuit did not opine upon the "sole cause" issue is because it had already (and erroneously) concluded that

Petitioner's inability to show he was replaced under the "replacement prong" of the *McDonnell Douglas* test was "fatal" to his case. (App., 10a, n.2). If the Sixth Circuit had *properly* applied a modified *McDonnell Douglas* test, the "sole cause" issue would have been decided, thus making it highly relevant to this case.

Further, the District Court in this case expressly ruled that Mr. Merrill must prove that "he was discharged ***solely*** by reason of his handicap." (App. 117a, emphasis added). By refusing to opine upon Petitioner's arguments on causation, and by not reversing the District Court on this issue, the Sixth Circuit tacitly upheld the District Court's determination that the proper causation standard is a "sole" cause standard rather than a "motivating cause" standard, a decision that is directly in conflict with the Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits. (Pet. 18-22). It is not accurate, therefore, to say that the Sixth Circuit did not address the causation issue; it addressed it by dismissing it without the benefit of discussing its merits, leaving the law of the case in direct conflict with its sister circuits. For all of these reasons, and for those elucidated in pages 18-22 of his Petition, Mr. Merrill respectfully submits that the standards contemplated by Sup. Ct. R. 10(a) are amply satisfied and the causation standard in ADA cases is ripe for review.

C. The "Interacting with Others" as a Major Life Activity Issue Was Raised and Addressed Below.

Respondent also argues that this Court need not consider whether "interacting with others is a major life activity" because the Sixth Circuit decided not to address this issue (Opp. 24) and, further, that Petitioner never presented to the lower courts the distinction between the ability to "interact with others" and the ability to "get along with others." (Opp. 25). However, the issue presented by Mr. Merrill in his Petition is this: "whether a plaintiff's ability to 'interact with'

co-workers constitutes a 'major life activity' for purposes of sustaining a claim under the ADA." It is not to create a body of law over the distinction between the ability to "interact" and the ability to "get along" with others. Moreover, and as is evident by his Sixth Circuit Brief on Appeal, Mr. Merrill specifically asked that court to address whether his ability to "work" was substantially limited based on Respondent's activities, and, ultimately whether he is "disabled" for purposes of the ADA.[2]

Additionally, and as with the causation standard, the Sixth Circuit refused to reach the issue of whether Mr. Merrill was "disabled" within the meaning of the ADA because it had already decided that his failure to satisfy the "replacement prong" of his prima facie case was "fatal" to his claim. Specifically, the Sixth Circuit held: "***Though the parties vigorously dispute whether Merrill was 'disabled' within the meaning of the ADA***, his failure to satisfy the fifth prong of the prima facie case is fatal." (App. 10a, n. 2, emphasis added).

It is important to note that it was Respondent who first pointed out to the District Court that a split of authority exists among the Circuits on whether "interacting with others" is a major life activity. In its Brief in Support of its Motion for Summary Judgment, Respondent stated:

> The federal circuit courts are split as to whether "interacting with others" is a major life activity for

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[2] Petitioner directs this Court's attention to the opinion of the District Court , in which the Magistrate Judge analyzed whether "work" was a major life activity. (Pet. App. 81a-85a). In that analysis, the Magistrate Judge stated that, of the two aspects involved in the ability to perform work, the first aspect was "the ability to get along with co-workers." (Pet. App. 83a).

> ADA purposes. *Compare Solieau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997)(ability to get along with others not a major life activity) with *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234-35 (9th Cir. 1999)(social interaction possibly could be major life activity). In *MX Group, Inc. v. City of Covington,* 293 F.3d 326, 337 (6th Cir. 2002), the Sixth Circuit mentioned the *McAlindin* decision in dicta, but did not explicitly adopt its holding that social interaction is a major life activity.

(Defendant's Brief in Support of Motion for Summary Judgment, at 17, n.6). Now, Respondent takes the exact *opposite* position and argues that there is *no* circuit split on the issue of whether interacting with others is a major life activity. (Opp. 26). Respondent should not be permitted to take an alternate legal position on this issue simply in an effort to avoid review in this case. For all of these reasons, Mr. Merrill's Petition should not be dismissed for want of jurisdiction.

II. THE MODIFIED *MCDONNELL DOUGLAS* TEST.

Turning now to the substantive aspects of Respondent's Opposition, Respondent raises a number of arguments in response to the first issue in Mr. Merrill's Petition. First, Respondent argues that the Sixth Circuit's opinion does not conflict with this Court's decision in *O'Connor v. Consolidated Coin Caterer's Corp.*, 517 U.S. 308 (1996). (Opp. 16-17). Respondent argues that *O'Connor* actually reaffirms the "replacement requirement" of the *McDonnell Douglas* test. However, in taking this position, Respondent ignores this Court's holding in that case that: "Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case." *Id.* at 310. It is precisely because the Sixth Circuit failed to

modify the replacement prong of the *McDonnell Douglas* test, as the *O'Connor* Court suggests doing when such a prong is entirely irrelevant in certain circumstances, that Mr. Merrill has filed this Petition.[3]

Second, Respondent argues that no split exists because "[t]here is no division among the circuits" on whether a modified *McDonnell Douglas* test should be used in RIF cases. (Opp. 19). Respondent submits that while the federal Circuit Courts have used "slightly different words to describe their adjustment of the standard in the RIF context" the differences all amount to "variations on the same theme," namely, a modified test for RIFs. (Opp. 20).

This argument is unavailing because it discounts the critical **substantive** differences among the circuits in the application of a modified *McDonnell Douglas* test. In fact, as is evidenced by footnote 4 of Respondent's Opposition Brief,

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[3] As is evident from his Petition, Petitioner asserts that *O'Connor* refutes rather than reaffirms that element. It is important to note that Respondent seems to take conflicting view points in its Brief. On the one hand, Respondent argues that the replacement prong is not reliable as an indicator of discrimination. (Opp. 19). But in a prior section of its brief, Respondent argues that there is "no reason why the replacement of a disabled employee by a non-disabled employee would not bear a logical relationship to the question of whether disability discrimination had taken place." (Opp. 18). Petitioner asserts that there are several reasons that there is no logical connection between the replacement element and the discrimination. The first being that in a RIF, as Respondent concedes, employees that are terminated are "rarely if ever 'replaced'." Further, there is no probative value in the replacement prong in this case and this Court has already found that the replacement prong is less reliable in determining discrimination, especially when the employee is not replaced by someone outside of his protected class.

it is apparent that the circuits do in fact apply substantively different standards under a modified *McDonnell Douglas* test, a fact Petitioner pointed out on pages 10-18 of the Petition. Moreover, Respondent's argument ignores the fact that the Sixth Circuit, *in this case*, refused to apply a modified test, even though Petitioner specifically argued for a modified test in the RIF context before the court. (Eleveld Aff., ¶¶ 1-3).

Third, Respondent argues that a modified *McDonnell Douglas* test does not apply in this case because Mr. Merrill was not discharged during a RIF. This is just not true. The District Court held that Mr. Merrill was not replaced after his termination in June 2001, and further, that Defendant let other employees go due to a reduction in force throughout the summer and fall of 2001. (App. 63a). While Respondent's factual assertion is erroneous, it is still irrelevant because the RIF test relied upon by Respondent (which requires that an employee be selected from a larger group), is a Fourth Circuit test, one which is not binding on the Sixth Circuit or on this Court.

Fourth, Respondent asserts that to prove discrimination under a RIF-modified *McDonnell Douglas* test, the evidence must "support an inference" of discrimination. (Opp. 21-22). Petitioner agrees with this assertion and also submits that he proffered sufficient facts in support of a reasonable inference of discrimination. The Sixth Circuit, however, concluded that reasonable inference of discrimination is not enough to preclude summary judgment in Respondent's favor and that to hold otherwise would contradict prior Sixth Circuit precedent. (App. 9a-10a). Because the Sixth Circuit has obviated potential discrimination claims on the basis of a reasonable inference, in direct contravention to its sister circuits, its decision in this case should be reviewed.

III. THE STANDARD FOR CAUSATION

Respondent concedes that the Sixth Circuit applies a "sole" cause standard in ADA cases, a standard that conflicts with its sister circuits (Opp. 14). Respondent argues, however, that the question is merely "the semantic matter of the title to be given to a causation standard ('sole' versus 'motivating' cause)." (Opp. 14). However, as is evident by the wealth of case law discussing the difference between a "sole cause" standard of causation and a "motivating cause" standard, the question is not one of mere semantics. Indeed, the terms are not interchangeable.

Respondent further argues that the resolution of the sole versus motivating cause issue would make no difference in this case. (Opp. 22). Respondent believes that it was not and is not necessary to determine a causation standard because no evidence supports Petitioner's discrimination claim. (Opp. 22-23). Respondent asserts that because the lower courts found no direct or circumstantial evidence, the causation standard does not matter. This is not true. The Sixth Circuit clearly held that certain reasonable inferences *could* be drawn from the facts of this case, but that reasonable inferences of discrimination were not enough to support a claim of discrimination and that a contrary ruling would contradict prior Sixth Circuit law. Petitioner asserts that the causation standard *is* relevant because there is evidence that supports a reasonable inference of discrimination in the case at bar. Further, Respondent has already asserted that evidence needed to support an inference of discrimination is the appropriate analysis when a RIF-based *McDonnell Douglas* test is applied and the Sixth Circuit has found such an inference could be found. (Opp. 22; App. 9a-10a). For these reasons, the issue of whether a sole cause or motivating cause standard of causation should apply in ADA cases is most certainly ripe for appeal, and most clearly in this case.

IV. INTERACTING WITH OTHERS AS A MAJOR LIFE ACTIVITY

The crux of Respondent's argument on this issue is that there is no circuit split on whether "***interacting with others***" is a major life activity. (Opp. 26). This position is directly contrary to the position Respondent took in its summary judgment briefing before the District Court, briefing in which Respondent specifically pointed out that "[t]he federal circuits are split as to whether 'interacting with others' is a major life activity for ADA purposes." (Defendant's Brief in Support of Summary Judgment, at 17, n.6). In light of its prior arguments, Respondent is now estopped from asserting that no such split exists.

Respondent also argues that "the District Court found that Petitioner was not substantially limited in ability to interact with others." (Opp. 27). However, the District Court, in granting Defendant's Motion for Summary Judgment, held that Petitioner's inability to "***get along with***" co-workers is not a "major life activity" within the meaning of the ADA. (App. 85a). That both the Court and Respondent use the language interchangeably further supports Petitioner's assertion that confusion exists about the distinction between the two. Thus, a significant split remains among the Circuit Courts on this issue.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: July 19, 2006

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APPENDIX D

AFFIDAVIT OF ROBERT J. ELEVELD

NOW COMES Robert J. Eleveld, the attorney for Petitioner in the matter of *Daniel Lee Merrill, Sr. vs. Burke E. Porter Machinery Company,* in the Supreme Court of the United States, Case No: 05-1565, and swears and affirms as follows:

1. I am counsel of record for Petitioner. I presented the Oral Argument on behalf of Petitioner before the Sixth Circuit Court of Appeals in this matter.

2. During that Oral Argument, I raised and argued at some length the question of whether it is appropriate to apply and/or modify the "replacement" prong of the *McDonnell Douglas* burden-shifting test during an economic downturn and specifically when the company that discharged the employee was undergoing a reduction in force (RIF).

3. I can attest that counsel of record for Respondent articulated counter-arguments against a modified *McDonnell Douglas* test in the RIF context during Oral Argument before the Sixth Circuit, to which I responded during my allotted rebuttal time.

4. Petitioner requested a copy and/or transcript of the recorded Oral Argument in this matter from the Sixth Circuit Court of Appeals and was advised by the Clerk of the Court that the transcription of that argument had been destroyed

prior to the completion of the 90-day period for the filing of a petition for writ of certiorari.

FURTHER, AFFIANT SAITH NOT.

Dated: 7/18/06 /s/_____
Robert J. Eleveld
Attorney for Petitioner

Subscribed and sworn to before me
on this **18th day of July 2006**.

/s/_____
Notary Public
Kent County, Michigan
My Commission expires June 3, 2001.